DECISION AND FINDINGS

OF THE SECRETARY OF COMMERCE

IN THE

CONSISTENCY APPEAL OF

THE KOREA DRILLING COMPANY, LTD.

FROM AN

OBJECTION BY THE CALIFORNIA COASTAL COMMISSION

January 19, 1989

SYNOPSIS OF DECISION

The Korea Drilling Company, Ltd. (KDC), a Korean corporation authorized to do business in the United States, proposes to conduct exploratory drilling for oil and gas on certain Outer Continental Shelf (OCS) tracts off the California coast pursuant to contracts with companies possessing leases to those tracts. In April 1986, KDC filed an application with the U.S. Environmental Protection Agency (EPA) for an individual National Pollutant Discharge Elimination System (NPDES) permit under the Federal Water Pollution Control Act, as amended, 33 U.S.C §§ 1251 et seq. The permit would allow KDC to discharge on those tracts drilling muds, cuttings and washwater; well completion and treatment fluids; and associated waste materials from its semi-submersible exploratory drilling vessel, the Doo Sung.

KDC certified in its application to EPA that its proposed discharge activity was consistent with the Federally approved California Coastal Management Program (CCMP). On August 4, 1986, EPA issued the NPDES permit, to become effective on September 11, 1986, provided that KDC had obtained the concurrence of the Commission with its consistency certification. Pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (Act), 16 U.S.C. §§ 1451 et seq., the California Coastal Commission (Commission) reviewed KDC's consistency certification. At a hearing held November 14, 1986, the Commission voted to object to the consistency certification. On December 10, 1986, the Commission adopted findings setting forth the basis for its action. The Commission summarized its objection as follows:

> [T]he Commission finds that the project as proposed would result in safety concerns endangering marine resources in the coastal zone and cause adverse socio-economic effects on local workers in the coastal zone. Therefore, it does not comply with the enforceable policy requirements of Chapter 3 of the California Coastal Act (Public Resources Code Section 30000 et seq.). The Commission furthermore finds that KDC's permit does not implement the national interest as required by Chapter 11 of the CCMP and Sections 302 and 303 of the [Act].

Under section 307(c)(3)(A) of the Act and 15 C.F.R. § 930.65 of the implementing regulations, 15 C.F.R. Part 930, the State's objection precludes EPA from issuing the NPDES permit unless, as provided at 15 C.F.R. § 930.131, the Secretary of Commerce (Secretary) finds that the activity objected to may be Federally approved because it is consistent with the objectives or purposes of the Act (Ground I) or necessary in the interest of national security (Ground II).

By letter dated December 12, 1986, and received December 15, 1986, in accordance with section 307(c)(3)(A) of the Act and 15 C.F.R. Part 930, Subpart H, KDC submitted to the Secretary a notice of appeal under Ground I from the Commission's objection to KDC's consistency certification. In order to satisfy Ground I, a proposed activity must meet the requirements of 15 C.F.R. § 930.121.

The Secretary, upon consideration of the information submitted by KDC, the Commission, Federal agencies and the public, made the following findings pursuant to 15 C.F.R. § 930.121.

1. KDC's proposed activity furthers the exploration for and development of offshore oil and gas resources and thereby furthers one or more of the competing national objectives or purposes contained in section 302 or 303 of the Act.

2. The proposed activity will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest.

   The proposed activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended.

4. There is no reasonable alternative available that would permit the proposed activity to be carried out in a manner consistent with the CCMP.

Conclusion

Having found all elements of 15 C.F.R. § 930.121 satisfied, the Secretary concluded that the proposed activity may be Federally permitted because it is consistent with the objectives or proposes of the Act. EPA may now make its NPDES permit for KDC effective.

DECISION

Factual Background

In April 1986, the Korea Drilling Company, Ltd. (KDC), a Korean corporation authorized to do business in the United States whose shareholders consist of five private Korean companies and Korea's national oil company, filed an application with the U.S. Environmental Protection Agency (EPA) under the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq., for an individual National Pollutant Discharge Elimination System (NPDES) permit. Initial brief from KDC, dated March 10, 1987, at 1-3. The permit would allow KDC to discharge drilling muds, cuttings and washwater; well completion and treatment fluids; and certain associated waste materials, in accordance with specified effluent limitations, from its semi-submersible exploratory drilling vessel, the Doo Sung, on certain Outer Continental Shelf (OCS) tracts off the California coast.[1] Id., Exhibit 17 (NPDES Permit No. CA-011072). KDC would undertake its exploratory drilling activity pursuant to contracts with companies possessing leases to the OCS tracts. Id. at 12. Before conducting any exploration activities (other than preliminary survey activities) on a site, each such company must itself receive approval for its Plan of Exploration (POE) for the site from the Minerals Management Service (MMS) of the Department of the Interior (DOI). 30 C.F.R. Part 250, Subpart B.

On August 4, 1986, EPA issued an individual NPDES permit to KDC, to become effective on September 11, 1986, provided that KDC had obtained the concurrence of the Commission with its certification that its proposed activity was consistent with the California Coastal Management Program (CCMP). Id., Exhibit 17. KDC made the following commitment in its consistency submission to the Commission:

> KDC recognizes that under the California Coastal Commission consistency certification, its NPDES permit authorizes activities only when performed in accordance with the conditions of a valid NPDES permit held by a POE operator and California Coastal Commission consistency certification.

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1 The tracts are identified in the appendix to the decision. Although the Doo Sung's permit is an "individual" one under EPA's regulatory program, it covers a large area off the California coast and in this way is similar to the general NPDES permit issued by EPA for certain leases offshore California that expired in 1984. That permit was extended by Region IX of EPA with regard to companies and facilities covered under it. KDC and the Doo Sung, however, were not among this group and could not have been among it, as the Doo Sung had not yet been brought to California at the time of issuance of the general permit. Initial brief from KDC, at 5-6.

> KDC commits that, prior to undertaking any activities under this permit, it will submit to the California Coastal Commission a written statement from the POE operator at each affected lease site, which states that the operator has received or will receive a valid NPDES permit prior to the commencement of any drilling and discharge activities, and a concurrence with a consistency certification for the operator's NPDES permit from the California Coastal Commission where required by the federal Coastal Zone Management Act. No activities shall be conducted unless authorized by and conducted in accordance with the operator's NPDES permit and state consistency certification.
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> Commission Findings on Consistency Certification, adopted on December 10, 1986 (hereinafter Consistency Objection).

At a hearing held November 14, 1986, the Commission voted to object to KDC's consistency certification. On December 10, 1986, the Commission adopted findings setting forth the basis for its action. The Commission summarized its objection as follows:

> [T]he Commission finds that the project as proposed would result in safety concerns endangering marine resources in the coastal zone and cause adverse socio-economic effects on local workers in the coastal zone. Therefore, it does not comply with the enforceable policy requirements of Chapter 3 of the California Coastal Act (Public Resources Code Section 30000 et seq.). The Commission furthermore finds that KDC's permit does not implement the national interest as required by Chapter 11 of the CCMP and Sections 302 and 303 of the [Act].
>
> Id.

Under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (Act), 16 U.S.C. §§ 1451 et seq., and 15 C.F.R. § 930.65 of the Department of Commerce's (Department's) implementing regulations, 15 C.F.R. Part 930, the Commission's objection to KDC's activity on the ground that it is inconsistent with the CCMP precludes EPA from issuing the NPDES permit unless, as provided at 15 C.F.R. § 930.131, the Secretary determines that the activity is "consistent with the objectives or purposes of the Act, or is necessary in the interest of national security."

Appeal to the Secretary of Commerce

By letter dated December 12, 1986, and received December 15, 1986, KDC submitted a notice of appeal under section 307(c)(3)(A) of the Act and 15 C.F.R. § 930.125. Under cover letter dated March 10, 1987, KDC submitted a brief and supporting data and information; under cover letter dated July 14, 1987, the Commission submitted a response. Under cover letters dated August 30 and September 3, 1987, respectively, KDC and the

Commission submitted final reply briefs. No public hearing was requested or held.

The Department published notice of the appeal in the Federal Register on January 14, 1987. After the appeal was perfected by receipt of KDC's submission dated March 10, 1987, the Department solicited comments on issues raised by the appeal in the Federal Register on April 8, 1987, and five newspapers published in the area likely to be affected by the proposed activity.[2] Comments were received from ARCO Oil and Gas Company, Chevron U.S.A. Inc. (Chevron), Exxon Company, U.S.A. (Exxon), and Sun Exploration and Production Company. The Department also solicited and received comments from the Departments of Energy, Navy, State and Treasury; the Fish and Wildlife Service and MMS of DOI; the U.S. Army Corps of Engineers; the U.S. Coast Guard; EPA; the Federal Energy Regulatory Commission; the U.S. International Trade Commission; the Office of the U.S. Trade Representative; and the International Trade Administration and National Marine Fisheries Service of this Department. All documents submitted by the parties and comments submitted by non-parties during the course of this appeal are included in the administrative record of the appeal.[3]

In this appeal, consistent with prior consistency appeals, I have not considered whether the State coastal management agency was correct in its determination that the proposed activity was inconsistent with the State coastal management program.[4] Rather, I have examined the State's objection only for the purpose of determining whether it was properly lodged, i.e., whether it complied with the requirements of the Act and its

2 Five Cities Times Press Recorder: May 29, June 3 and 5, 1987; Long Beach Press Telegram: June 1, 2 and 3, 1987; Orange County Register: May 28, 29 and 30, 1987; Santa Barbara News Press: May 29, 30 and 31, 1987; and Ventura County Star Free Press: May 28, 29 and 30, 1987.

3 Although all materials received have been included in the record, I have considered them only as they are relevant to the statutory and regulatory grounds for deciding consistency appeals (and to compliance with the regulations governing the conduct of such appeals).

4 Although past consistency appeal decisions have been limited to consideration of the statutory and regulatory grounds for an override, there is some authority for a review of the correctness of the State's objection. See Exxon v. Fischer, 807 F.2d 842 (9th Cir. 1987).

implementing regulations.[5] I conclude that the State's objection was properly lodged.

I find that this appeal is properly before me for consideration and that the parties have complied with the Department's regulations governing the conduct of the appeal, Subparts D and H of 15 C.F.R. Part 930.

Threshold Issue

In the submissions filed during this appeal, the Commission raised the issue of whether the activity considered on appeal must be the same activity it reviewed for consistency. The Commission argues that, because KDC in its appeal offers what the Commission views as commitments[6] as to training programs, the use of Americans in supervisory positions, the use of English as the working language on board ship, the potential use of domestic support services, and other aspects of its operations that it did not make to the Commission during the Commission's review of KDC's consistency certification, the activity before me on appeal is not the same activity reviewed by the Commission. The Commission then asserts that if I consider the activity on appeal with commitments different from those made to the Commission by KDC during its consistency review, the Commission will have effectively been denied its opportunity to review for consistency the "new" activity. The Commission further argues that since the new commitments that KDC made in its appeal were not contained in KDC's consistency certification, they are not binding on KDC. Initial brief from the Commission, dated July 14, 1987, at 7-8.

Even assuming arguendo that KDC has made new commitments, the Commission's argument is without merit. The sole effect of

5 15 C.F.R. § 930.64 requires the State to notify the applicant and the Federal agency of its objection within six months of commencement of its review of the proposed activity. That section also requires the State, in its objection, to describe how the proposed activity is inconsistent with specific elements of its management program and to describe alternative measures, if any exist, which, if adopted, would permit the proposed activity to be conducted in a manner consistent with its management program. The regulations further require the State to inform the applicant of his right to appeal the State's objection to the Secretary for a determination that the proposed activity may be permitted because it is consistent with the objectives or purposes of the Act or necessary in the national interest.

6 KDC states that it has neither changed the description of the activity that it proposed to the Commission nor made any commitments to the Secretary that it did not make to the Commission. Final brief from KDC, dated September 4, 1987, at 7.

sustaining an appeal is to authorize the Federal agency from whom the license or permit in question is sought to issue the license or permit notwithstanding the State's consistency objection. The activity that the agency is authorized to license or permit is the one that the State coastal management agency reviewed for consistency (including any commitments made by the appellant to the State agency), as modified by any commitments made by the appellant during the course of the appeal. This decision describes the activity that the Federal agency may license or permit. That agency is not authorized to license or permit any other activity. Of course, the agency may impose more restrictive or protective conditions as it sees fit.

The fact that the Commission did not consider what it views as KDC's new commitments when reviewing KDC's consistency certification is simply not relevant. The issue on appeal -- whether a statutory ground (as further delineated by implementing regulations) for an override of the Commission's objection is satisfied -- was not the issue before the Commission during its consistency review. If the Commission believes a commitment made by KDC is inadequate, the Commission has ample opportunity to respond and offer evidence during the course of the appeal. Thus, as long as the Commission has the opportunity to address the merits of all commitments made during the appeal, whether the commitments were originally made to it or not, and I consider its views, its interests will not have been prejudiced.

My determination is further buttressed by section 307(c)(3)(A) of the Act and 15 C.F.R. § 930.132. Those provisions authorize me to consider on my own volition, either before or after completion of State agency review, whether an activity satisfies the statutory grounds for an override. In such a case, the parties' interests are protected by their being given an opportunity to brief the issues as part of my review process.

In the present instance, EPA issued KDC a permit to discharge from the Doo Sung specified materials in accordance with specified effluent limitations. The effectiveness of the permit was conditioned only on KDC's procurement of the concurrence of the Commission with its consistency certification. Accordingly, the activity that I am considering here on appeal consists of the discharges by KDC from the Doo Sung allowed under the EPA permit, the commitment quoted in the Factual Background section of this decision, and KDC's statements during the course of the appeal, which I view as commitments, as to the use of English as the working language on board the Doo Sung and its following the training, staffing and safety program developed with its consultants.

Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the Act provides that a Federal license or permit for an activity affecting land or water uses in the coastal zone may not be granted until either the State concurs with the applicant's certification that such activity is

consistent with its Federally approved coastal zone management plan,[7] or the Secretary finds, "after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the [S]tate, that the activity is consistent with the objectives of [the Act] [Ground I] or is otherwise necessary in the interest of national security [Ground II]." KDC has pleaded only that its proposed activity is consistent with the objectives or purposes of the Act. Initial brief from KDC, at i. I have therefore confined my review to Ground I.

The regulation interpreting the statutory ground "consistent with the objectives of" the Act, 15 C.F.R. § 930.121, states:

> The term "consistent with the objectives or purposes of the Act" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because it satisfies the following four requirements:
>
> (a) The activity furthers one or more of the competing national objectives or purposes contained in section 302 or 303 of the Act,
>
> (b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest,
>
> (c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and
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> (d) There is no reasonable alternative available (e.g., location[,] design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

In order for me to sustain KDC's appeal, its proposed activity must satisfy all four elements of 15 C.F.R. § 930.121. Failure to satisfy any one element precludes me from finding that the proposed activity is consistent with the objectives of the Act.

[7] Its concurrence may be conclusively presumed in certain circumstances.

Element One: The Activity Furthers One or More of the Competing National Objectives or Purposes Contained in Section 302 or 303 of the Act

Sections 302 and 303 of the Act identify a number of objectives or purposes, which can be stated as follows:

1. To preserve, protect and, where possible, restore or enhance the resources of the coastal zone (sections 302(a), (b), (c), (d), (e), (f), (g) and (i) and 303(1));

2. To develop the resources of the coastal zone (sections 302(a), (b) and (i) and 303(1); and

3. To encourage and help the States to exercise their full authority over the lands and waters in the coastal zone, giving consideration to the need to protect as well as develop coastal resources, in recognition by the Congress that State action is the key to more effective protection and use of the resources of the coastal zone (sections 302(h) and (i) and 303(2)).

In addition, the Act also recognizes a national objective in achieving a greater degree of energy self-sufficiency, which objective would be advanced through the provision of financial assistance to States and localities (section 302(j)).

Earlier consistency appeal decisions have stated that exploration, development and production activities and consideration of their effects on land and water uses of the coastal zone are included among the objectives and purposes of the Act. Further, because Congress has broadly defined the national interest in coastal zone management to include both protection and development of coastal resources, as stated in earlier decisions, this element will "normally" be found to be satisfied on appeal. Decision and Findings in the Consistency Appeal of Gulf Oil Corporation before the Secretary of Commerce (December 23, 1985) (hereinafter Gulf Decision), at 4; Findings and Decision in the Matter of the Appeal by Exxon Company, U.S.A. to the Consistency Objection by the California Coastal Commission to Exxon's Proposed Development of the Santa Ynez Unit by Means of Development Option A (February 18, 1984) (hereinafter Exxon Santa Ynez Decision), at 6-8.

KDC argues that its provision of contractual drilling services to companies desiring to explore for oil and gas resources in an area of the OCS off the California coast would further the exploration for and development of such resources (initial brief from KDC, at 12), activities included among the objectives of the Act, as noted above. The Commission, however, takes issue with KDC's contention that the availability on the California OCS of the Doo Sung would further the exploration for and development of such resources. Initial brief from the Commission, at 18-19, 25. The Commission alleges that there are drillships "'stacked' and

waiting for work" on the California OCS. Initial brief from the Commission, at 18; final brief from the Commission, dated September 3, 1987, at 7. The Commission therefore asserts that "adequate" competition already exists on the California OCS. Id. at 10. The Commission further asserts that KDC's proposed operation may actually reduce competition, in that "if wage and other monetary factors, or subsidies or tax savings, affect the Doo Sung's operating costs, it may ultimately drive away other operators and the pricing incentive provided by the competition." Id. at 7. The Commission supports this assertion with evidence in the form of citations to the Wall Street Journal and Newsweek stating that Korean blue-collar workers are paid on average much less than United States workers. Id.

KDC responds to the Commission's argument that "adequate" competition already exists on the California OCS by explaining that the increased competition for drilling work occasioned by the availability of the Doo Sung could reduce the price of drilling, with the result that companies that otherwise would not conduct exploration activities might then find it in their economic interest to do so. Final brief from KDC, at 10.

I am persuaded by KDC's argument. Obtaining an NPDES permit enables KDC to compete for drilling work on certain tracts in the California OCS. A basic tenet of our economic system is that more competition is better because it tends to result in lower prices. The entry of another competitor into the market helps keep all competitors sharp. It is not necessary for KDC to establish that it will be able to operate at a lower cost than "domestic" drilling vessels. As MMS stated:

> The KDC project will contribute significantly to the national interest goals of national energy sufficiency and development of the oil and gas resources of the OCS while protecting the natural resources of the coastal zone. In addition to the exemplary safety record cited above, having this rig available for use on the OCS will allow industry to have access to a number of competitively priced drilling rigs, providing economic incentive for industry to explore for hydrocarbons during a time of depressed market conditions. It is clearly in the national interest to have as great a variety of safe, modern, reasonably priced drilling rigs, including the Doo Sung, available for industry's use in developing California's OCS oil and gas reserves.
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> Letter from William D. Bettenberg, Director, Minerals Management Service, to Anthony J. Calio, Administrator, NOAA, dated July 17, 1987, at 3.

Similarly, the Department of State commented:

> By limiting competition in the market for drilling services, this action by the CCC could increase the cost of production

> of offshore oil and thus conflict with our policy of encouraging the economic development of indigenous energy resources. As a result of the decline in oil prices, U.S. oil companies have had to slash their budgets for exploration and development. It is therefore particularly important to avoid actions that would increase production costs and stand in the path of increased production.
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> Letter from Alan P. Larson, Deputy Assistant Secretary for International Energy and Resources Policy, U.S. Department of State, to Anthony J. Calio, Administrator, NOAA, dated July 2, 1987, at 1.

ARCO Oil and Gas Company stated:

> In allowing the Commission's decision to stand, an adverse precedent would be established that would be detrimental to the oil industry's interest in awarding contracts to the most competitive bidder. As ARCO has recently experienced, the number of competitively priced drilling vessels in offshore California waters has dramatically reduced the cost of exploration. This cost reduction has given ARCO the opportunity to proceed with exploratory projects, offshore California, that may not have been drilled otherwise.
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> Letter from Paul B. Norgaard, Vice President, ARCO Oil and Gas Company, to Secretary Baldrige, dated April 27, 1987.

Similarly, Exxon proffered its conviction that "competitive bidding is the best approach to ensure that critical energy supplies will be made available to U.S. industry and consumers in a cost effective manner." Letter from Thomas M. Morneau, Counsel, Exploration Department, Offshore/Alaska Division, Exxon, to Daniel W. McGovern, General Counsel, NOAA, dated April 29, 1987, at 2.

The Commission alleges that possible Korean monetary, subsidization or taxation factors might unfairly reduce the Doo Sung's operating costs and thus lessen competition on the California OCS in the long run. Initial brief from the Commission at 11, 14; final brief from the Commission, at 7. While foreign competition, like any competition, always presents the possibility of being unfair, the presence of a specter is not sufficient reason to disallow the competition. If unfair competition takes place, remedies exist in other forums by which it can be redressed.

Based on the above analysis, I find that the availability of the Doo Sung on the OCS offshore California would increase competition for drilling work there and thus further the exploration for and development of offshore oil and gas resources. Accordingly, I find that KDC's proposed activity satisfies Element One of Ground I.

Element Two: When Performed Separately or When Its Cumulative Effects Are Considered, the Activity Will Not Cause Adverse Effects on the Natural Resources of the Coastal Zone Substantial Enough to Outweigh Its Contribution to the National Interest

Element Two of 15 C.F.R. § 930.121 requires that I identify: (1) the adverse effects of the activity objected to on the natural resources of the coastal zone, ignoring other activities affecting the coastal zone; and (2) the cumulative adverse effects of the activity objected to, i.e., the adverse effects from the conduct of the activity in combination with other activities affecting the coastal zone. Element Two then requires me to identify the contribution of the activity to the national interest. Finally, it requires me to determine whether the adverse effects are substantial enough to outweigh the contribution of the activity to the national interest.

Adverse effects on the natural resources of the coastal zone can arise from the routine conduct of an activity either by itself or in combination with other activities affecting the coastal zone. Adverse effects can also arise from an unplanned event, i.e., improper conduct of an activity or an accident, once again either by itself or in combination with other activities.

A. Adverse Effects from Routine Conduct

The Commission in its consistency objection, which is part of the record in this appeal, maintains that routine discharges within NPDES permit limits have adverse effects on the natural resources of the California coastal zone, the severity of which varies with such factors as site and season. Consistency Objection, at 4. The Commission also espouses that view in its findings regarding EPA's draft general NPDES permit (February 4, 1985). Initial brief from the Commission, Exhibit 10. The Commission believes, however, that because of the supplemental language KDC included in its consistency submission (see pp. 1-2 of this decision), the Commission's need for timely specific information will be met. Consistency Objection, at 6.

EPA, the grantor of KDC's conditional NPDES permit, commented that it did "not believe that [KDC's] proposed activity will, either separately or when its cumulative effects are considered, cause adverse effects on the natural resources of the coastal zone." Letter from Jennifer Joy Wilson, Assistant Administrator for External Affairs, EPA, to Anthony J. Calio, Administrator, NOAA, dated June 26, 1987, at 2. EPA reached its conclusion by applying the standard that it is required to use to determine whether to issue an NPDES permit for discharge into OCS waters, i.e., whether the proposed activity is expected to result in "unreasonable degradation of the marine environment." Id.

MMS similarly commented with regard to both separate and cumulative effects on the natural resources of the coastal zone that "[c]oncerns regarding the environmental effects of discharge

authorized under EPA's NPDES permit are unwarranted." Letter from William D. Bettenberg, Director, MMS, to Anthony J. Calio, Administrator, NOAA, dated July 17, 1987, at 3. MMS quoted the National Academy of Sciences as having concluded:

> The panel's review of existing information on the fates and effects of drilling fluids and cuttings on the OCS shows that the effects of individual discharges are quite limited in extent and are confined mainly to the benthic environment. These results suggest that the environmental risks of exploratory drilling discharges to most OCS communities are small.
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> Id.

The Fish and Wildlife Service, on the other hand, stated:

> The proposed drilling by [KDC] is not a single operation but an extensive plan to drill over several oil fields and prospects off the southern California coast. Since the Service does not have detailed information on when or where [KDC] will drill during the 5-year option covered in this permit action, the Service is unable to determine whether unreasonable degradation of the marine environment off the southern California coast will occur.
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> Letter from Frank Dunkle, Director, Fish and Wildlife Service, to Anthony J. Calio, Administrator, NOAA, dated August 24, 1987, at 1-2.

To summarize, EPA and MMS believe that KDC's proposed discharge activity, both when performed separately and when its cumulative effects are considered, will not cause substantial adverse effects on the natural resources of the coastal zone. The Commission and the Fish and Wildlife Service believe that whether routine operations will cause substantial adverse effects depends on such factors as site and season. Such detailed information will be provided in the POE submitted by each company hiring KDC to provide exploratory drilling services. See 30 C.F.R. Part 250, Subpart B. I therefore find, given that exploratory drilling by the Doo Sung (or, for that matter, any other drilling vessel) at a site can only take place if the Commission concurs with the consistency certification for the POE covering that site (or the Secretary overrides the Commission's objection) and MMS approves the POE, that the routine conduct of KDC's proposed activity (i.e., discharges within the NPDES permit limits), either by itself or in combination with other activities affecting the coastal zone, will not have substantial adverse effects on the natural resources of the coastal zone.

B. Adverse Effects from Unplanned Events

The Commission argues in this appeal that the operation of the Doo Sung would present an unacceptable risk of harm to marine resources because its crew would be made up in part of workers with potentially inadequate proficiency in English and familiarity with safety procedures, and correspondingly limited ability to handle emergencies.[8] Initial brief from the Commission, at 26-31.

KDC addresses the Commission's concern about safety by, inter alia, providing information about its training and staffing procedures. In August 1982, apparently before the construction of the Doo Sung was completed, KDC entered into a still-ongoing Technical Operations Assistance Agreement with Western Services International for technical services intended to ensure the safe operation of the Doo Sung. These services include "personnel, organization, safety, and training." Initial brief from KDC, at 3 and 28. Western Services International is a consulting arm of Western Oceanic, Inc., a company providing offshore drilling services worldwide and presently operating sixteen mobile offshore drilling units (four semi-submersibles and twelve jack-ups). Id. at 3. (Hereinafter Western Services International and Western Oceanic, Inc. will be collectively referred to as "Western.") Western and KDC have developed a

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8 On February 29, 1984, KDC received certification from the U.S. Coast Guard, the agency statutorily authorized to make such determinations, that the Doo Sung qualified for an exception to the general rule that structures engaged in OCS activities must be crewed by citizens of the United States or resident aliens. Initial brief from KDC, Exhibit 5.

Federal law requires, with certain exceptions, that "any vessel, rig, platform, or other vehicle or structure" engaged in OCS activities be crewed by citizens of the United States or resident aliens. 43 U.S.C. § 1356; 33 C.F.R. Part 141. One exception is provided in 33 C.F.R. § 141.5(b)(3), which states that the restrictions on employment do not apply to personnel on any:

> [u]nit over 50 percent of which is owned by one or more citizens of a foreign nation or with respect to which one or more citizens of a foreign nation have the right effectively to control, except to the extent and to the degree that the President determines that the government of such foreign nation or any of its political subdivisions has implemented, by statute, regulation, policy, or practice, a national manning requirement for equipment engaged in the exploration, development, or production of oil or gas in its offshore areas.

KDC has stated that English will be the working language on board. Id., Exhibit 26, at 4.

program under which Western personnel initially fill all supervisory and other key positions, with Korean personnel gradually phased in as they gain experience under the direction of the Western personnel. Id. at 28-29.

KDC elaborates:

> Consistent with this program, during its first contract operations for Exxon in 1984, the Doo Sung crew was composed of 84% Western personnel and 16% Korean personnel. All supervisory and other key positions were staffed with Western personnel. During the 1985 drilling operations, the involvement of Korean personnel was increased because the Koreans had gained adequate experience to undertake additional responsibilities. The resultant crew composition was approximately 57% U.S. and 43% Korean. For the next drilling contract, the crew composition will be similar. Exhibit 29 shows how the key onboard positions will be filled. All the supervisory and key positions will be held by Western. Any changes in the crew composition must be mutually agreed upon by Western and KDC after Western determines that the Korean personnel have been adequately trained and have sufficient experience to occupy the position. (See Declaration of James Sisk, Exhibit 29 (sic: should be 26)).
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> Id. at 29.

KDC further states that its personnel are subject to the same training, both formal and on board, and experience requirements as Western personnel (id.); KDC includes as an exhibit to one of its briefs in this appeal a copy of an article outlining Western's standard program for training and advancement of rig operations personnel. Id., Exhibit 30. KDC states that "[a]ll Western and KDC personnel have received some variation of this program, depending on prior experience, education, and aptitude." Id. at 29.

KDC also states that the Doo Sung has met all U.S. design and equipment standards. Initial brief from KDC, at 26-28. KDC has provided copies of its certificates of compliance for inclusion in the administrative record. Id., Exhibit 28.

KDC further notes that, using joint American-Korean crews, the Doo Sung has already drilled five exploratory wells in OCS waters of the United States, four under contract to Exxon and one under contract to Gulf Exploration and Development Corporation, which subsequently became part of Chevron. Id. at 30. Both Chevron and Exxon lauded the safety of KDC's drilling operations in their letters regarding this appeal. Letter from Clair Ghylim, General Manager, Land Department, Western Region, Chevron, to Daniel W. McGovern, General Counsel, NOAA, dated May 4, 1987; letter from Thomas M. Morneau, Counsel, Exploration Department,

Offshore/Alaska Division, Exxon, to Daniel W. McGovern, General Counsel, NOAA, dated April 29, 1987, at 1. Exxon made the following comment with respect to the two wells drilled for it by KDC in the Navarin Basin, offshore Alaska: "[I]t is Exxon's opinion that the environmentally sensitive and operationally safe manner in which these drilling operations were conducted were a significant factor in the MMS's decision to award Exxon the MMS's Safety Award for Excellence for the period July - December, 1985." Id. Exxon was given this award for undergoing over one hundred inspections without a single incident of noncompliance. Id., Attachment 3, Safety Award for Excellence, Alaska OCS Region. KDC states that many of these inspections were of the Doo Sung, which operated at that time with a crew composed of 57% Americans and 43% Koreans. Initial brief from KDC, at 30.

The Commission rebuts KDC's arguments regarding safety by, inter alia, noting that the award received by Exxon should not be given undue weight because, first, it covers only a limited period of operation by KDC and, second, KDC's policy is to phase in new trainees, not maximize the use of experienced workers. Final brief from the Commission, at 12.

The Commission also points out that, by KDC's own admission (initial brief from KDC, Exhibit 22),[9] KDC workers in the past have had to be dismissed because of language problems. Initial brief from the Commission, at 30. The Commission further asserts that KDC's policy of work shifts of four weeks in duration followed by four weeks off is "not at all conducive" to the attainment or maintenance of the significant level of English proficiency needed to ensure the safety of OCS operations. Initial brief from the Commission, at 30-31. Finally, the Commission, as support for its broad assertion that "non-domestic" OCS activities increase safety risks, quotes a statement of DOI included in a brief submitted by KDC in this appeal that the spill rates of foreign tankers are higher than those of U.S. tankers. Initial brief from the Commission, at 29.

Both KDC and the Commission seem frequently to lose sight of the fact that the activity objected to is not exploratory drilling but rather the discharges from the Doo Sung enumerated in KDC's NPDES permit. The NPDES permit does not itself allow exploratory drilling to take place. MMS approval of a POE covering a given site allows drilling to take place on it. In deciding whether to approve a POE, MMS is required to consider eventualities such as oil spills. In order to determine the risk of an unplanned event such as an oil spill occurring and causing substantial adverse effects, an in-depth analysis of the specific site, exploration activities, well locations and timetable proposed must be performed. MMS regulations accordingly require the provision of

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9 KDC explained in its final brief that the incident in question occurred at the beginning of the initial operation of the Doo Sung and involved only one "low level" worker. Final brief from KDC, at 18.

a great amount of detailed information regarding such matters. See 30 C.F.R. Part 250. Thus, as I limited my consideration of adverse effects from routine operations to those that would be caused by discharges within the limits established in KDC's NPDES permit, I limit my consideration of adverse effects from unplanned events to the risk of discharges occurring in excess of the NPDES permit limits.

The record of this appeal demonstrates that the risk of such an unplanned event occurring with respect to the Doo Sung and causing substantial adverse effects on the natural resources of the coastal zone, either by itself or in combination with other activities affecting the coastal zone, is insignificant. The Doo Sung has met all U.S. design and equipment standards. The Doo Sung has an exemplary safety record, and KDC has developed with its consultants and is committed to follow a training, staffing, and safety program designed to ensure the maintenance of this record and adherence to all statutory and regulatory requirements imposed upon it. In addition, the requirement in KDC's NPDES permit of self-monitoring of discharges (initial brief from KDC, Exhibit 17) further reduces the risk of discharges occurring in excess of the permit limits.

The evidence presented by the Commission that foreign tankers have higher spill rates than U.S. tankers is not relevant to determining the risk of discharges occurring in excess of KDC's NPDES permit limits. While the dismissal incident on the Doo Sung noted by the Commission relates to language difficulties and is therefore relevant to determining whether the risk of discharges in excess of the NPDES permit limits is higher with respect to the Doo Sung than for an American-crewed vessel, it was an isolated incident occurring at the beginning of the vessel's first operation and not since repeated, although the percentage of Korean workers comprising the crew has greatly increased. The incident therefore has insignificant, if any, probative value. The Commission's assertion regarding the effect of a four-week work-shift policy is not supported by evidence, and, more important, even if true, would not be sufficient to establish that KDC's Korean workers suffer from language deficiencies increasing the risk of discharges in excess of the NPDES permit limits. As for KDC's program to phase in new trainees, such an advancement plan is hardly unusual, but rather the norm for U.S. companies (final brief from KDC, at 18), and the Commission has provided no evidence that KDC prematurely promotes its people to the detriment of safety.

Based on the above analysis, I find that the risk of discharges by the Doo Sung in excess of KDC's NPDES permit limits occurring and causing substantial adverse effects on the natural resources of the coastal zone, either by themselves or in combination with other activities affecting the coastal zone, is insignificant.

C. National Interest

KDC asserts that its proposed activity would benefit the national interest in at least the following ways: 1) It would increase competition among drilling contractors on the California OCS. Initial brief from KDC, at 17. 2) It would have "beneficial socio-economic effects." Id. at 18. 3) It would "benefit the national interest because [it is] consistent with this country's international trade policies which encourage free and open trade of goods and services between the United States and foreign countries." Final brief from KDC, at 8.

The national interests to be balanced in Element Two are limited to those recognized in or defined by the objectives or purposes of the Act. In other words, while a proposed activity may further (or impede) a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, such a national interest may not be considered in the balancing.

(i) Increased Competition Among Drilling Contractors on the California OCS/ Furthering the Exploration for and Development of Offshore Oil and Gas Resources

I have already concluded in the analysis of Element One that the availability of the Doo Sung on the California OCS would increase competition among drilling contractors there and in so doing further the exploration for and development of offshore oil and gas resources. Thus, the availability of the Doo Sung is in the national interest in that respect.

ii Economic Effects

As stated above, KDC argues that its proposed activity would have "beneficial socio-economic effects," particularly with respect to local offshore service industries. It explains that OCS exploratory drilling activities are highly dependent on services from nearby onshore areas and use large amounts of local products. Initial brief from KDC, at 18. The Commission counters that any such benefits would result from the fact that anyone is conducting drilling activity, not from the fact that KDC is conducting it. The Commission further argues that KDC's proposed activity would actually have adverse socio-economic effects, in that Koreans would be filling positions that would otherwise be filled by Americans. The Commission also points out that there is no guarantee that KDC would use local goods and services. Initial brief from the Commission, at 20-24.

The national interest in improving the economic condition of the coastal zone is arguably within the scope of the objectives or

purposes of the Act.[10] It is impossible at this time, however, to determine the net economic effect on the coastal zone from KDC's proposed activity. If the availability of the Doo Sung on the California OCS ultimately causes exploratory drilling to occur that otherwise would not have taken place, the impact will be positive. On the other hand, if the availability of the Doo Sung ultimately means that drilling that otherwise would have been performed by an American-owned and -crewed vessel is performed by the Doo Sung, the impact will be negative. (Even with an American-owned and -crewed vessel, however, there is no guarantee that local goods and services will be used.)

The United States Trade Representative supports the Commission's position in so far as he commented that "allowing foreign competition in the United States would indeed tend to have an effect on local [coastal zone] workers [of having fewer opportunities to compete for local jobs given the existing depression of the offshore oil industry] . . . ." Letter from Clayton Yeutter, United States Trade Representative, to Anthony J. Calio, Administrator, NOAA, dated June 2, 1987.

The Trade Representative, however, continued:

> [Nonetheless,] I do not believe that such competition should be excluded for this reason alone. Our own industry is also seeking to bid on overseas offshore drilling work, and if this principle were to be applied elsewhere, we would be unable to compete for these opportunities. Foreign competition, if it is fair and meets all environmental and safety standards, should be allowed if we expect reciprocal treatment from other countries where our own industries seek to compete.
>
> Id.

The Trade Representative, in other words, agrees with KDC's assertion that not allowing it to engage in its proposed activity could result in retaliation by Korea and/or other countries, jeopardizing the ability of American-owned or -crewed vessels to provide drilling services overseas. While in the next section I conclude that the broad national interest in encouraging free-trade policies is beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, to the extent that not allowing KDC to operate on the California OCS might result in American-owned or -crewed vessels being denied the opportunity to compete overseas, there could be negative economic effects on the coastal zone that I should consider.

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10 The modifier "socio-" is unnecessary and confusing, as the issue here is employment of coastal zone workers and use of coastal zone products.

The Commission views these concerns as speculative and overstated, arguing that, since only one drilling vessel is at issue in this appeal, it is very unlikely that significant retaliation would occur. Initial brief from Commission, at 14-16.

Federal agencies with great expertise in the area disagree. I am persuaded by them. For example, as indicated earlier, the United States Trade Representative is very concerned. The International Trade Administration similarly commented:

> Were we to go along with California's insistence on a U.S. vessel, it could have negative trade consequences. The U.S. offshore drilling industry is among the largest and most sophisticated in the world. It enjoys access in areas ranging from the North Sea through Middle East to Southeast Asia. Applying what amounts to a "Buy America" provision could result in foreign nations retaliating against the U.S. offshore drilling industry. Given the large number of U.S. drilling vessels, we could stand to lose more. Such an action would also run counter to our efforts under the General Agreements on Tariffs and Trade [GATT] to obtain non-discriminatory access to foreign markets.
>
> Memorandum from Paul Freedenburg, Assistant Secretary for Trade Administration, to Anthony J. Calio, Administrator, NOAA, dated July 17, 1987, at 7.

The U.S. Department of State commented:

> The action by the CCC could also undermine our efforts to discourage other governments from discrimination against U.S. suppliers of oilfield equipment and services. The measure would place the United States in the awkward position of flouting the type of principles, such as national treatment and non-discrimination, we are currently negotiating with other countries in the GATT Uruguay Round, in attempting to achieve international agreement on expanding GATT rules to cover trade in services. A perceived U.S. disregard for our own proposed principles could, among other things, jeopardize important U.S. negotiating objectives in the Uruguay Round, and conflict with our vigorous efforts to persuade other countries, including South Korea, to provide market access to U.S. service companies. Recently, South Korea improved access to the Korean market for U.S. insurance companies in response to these efforts. Exclusion of Korean vessels from participating in offshore drilling on the grounds of the availability of domestic vessels and crews would jeopardize the advantages for American firms we have won, and hope to increase.
>
> Letter from Alan P. Larson, Deputy Assistant Secretary for International Energy and Resources Policy, U.S. Department of State, to Anthony J. Calio, Administrator, NOAA, dated July 2, 1987, at 1-2.

In conclusion, I find the net economic effect on the coastal zone from KDC's proposed activity to be indeterminate. Indeterminacy, however, is not the same as a net value of zero. I therefore must consider both possible cases in the balancing below. If the net economic effect on the coastal zone is positive, it will simply add to the contribution to the national interest found earlier from the increase in competition among drilling contractors on the California OCS. If the net economic effect is negative, it will only be minor in degree because at issue is only the employment by one drilling contractor (owning one drilling vessel) of some foreign workers, and any concomitant reduction in the use of coastal zone goods and services.[11]

(iii) Consistency with U.S. International Trade Policies

KDC argues that allowing it is to engage in its proposed activity would "benefit the national interest because [it is] consistent with this country's international trade polices which encourage free and open trade of goods and services between the United States and foreign countries." Final brief from KDC, at 8. I find that encouragement of free-trade policies for its nation-wide benefits is a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, and I accordingly will not consider it in the balancing.

(iv) Energy Security

The Commission argues that "the national interest in energy security depends not only on development, but also on the ability of the United States to develop its supplies quickly and independently. That ability requires trained personnel and viable equipment. Again, the national interest is best served by the use of domestic operators." Initial brief from the Commission, at iii-iv.

The Commission's argument is unpersuasive. First, the record demonstrates that KDC will use trained personnel and viable equipment. Second, the availability of the Doo Sung on the California OCS will increase competition. This will contribute toward the United States developing its energy supplies quickly. Finally, the Commission has repeatedly stated that there are viable American drillships with trained American personnel "'stacked' and waiting for work" on the California OCS. Initial brief from the Commission, at 18; final brief from the Commission, at 7. I therefore decline to find that allowing

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11 KDC states, and I view this as a commitment, as previously discussed, that "[a] significant portion of the approximately 68 persons (34 per each of two crews, one on and one off duty) assigned to the drilling rig and nearly all of the onshore supervisory positions would be held by American workers employed by an American company, Western." Initial brief from KDC, at 35.

this foreign-owned vessel with its partially foreign crew to compete for work on the California OCS will put the United States in a position where there is a dearth of competent American personnel and viable American equipment. There is no such evidence in the record.

D. Balancing

Above I found that neither the routine conduct of KDC's proposed discharge activity by itself nor such conduct in combination with other activities affecting the coastal zone would have substantial adverse effects on the natural resources of the coastal zone. I also found that the risk of substantial adverse effects on the natural resources of the coastal zone from unplanned events in connection with the proposed activity, either by themselves or in combination with other activities affecting the coastal zone, was insignificant. Additionally, I found that KDC's proposed activity would further the national interest in exploration for and development of domestic offshore oil and gas resources and possibly also the national interest in an improved economic situation in the coastal zone. KDC's proposed activity might also worsen that economic situation, but, if so, to only a minor degree. Therefore, I conclude that the adverse effects of the proposed activity on the natural resources of the coastal zone are insufficient to outweigh its contribution to the national interest.

Element Three: The Activity Will Not Violate Any Requirements of the Clean Air Act, as Amended, or the Federal Water Pollution Control Act, as Amended

To find that Element Three of Ground I is satisfied, I must find that "[t]he activity will not violate any requirements of the Clean Air Act, as amended [CAA], or the Federal Water Pollution Control Act, as amended [FWPCA]." 15 C.F.R. § 930.121(c). The requirements established by the CAA and FWPCA, and those established by the Federal Government and State and local governments pursuant to those acts, are incorporated into all State coastal management programs approved under the Act and become the air and water pollution control requirements applicable to such programs. 16 U.S.C. § 1456(f).

KDC argues that, as found in all prior consistency appeal decisions involving OCS activities, the proposed OCS activity will not violate any requirement established by or pursuant to the CAA or FWPCA because DOI with respect to CAA requirements and EPA with respect to FWPCA requirements have established regulatory programs applicable to the activity to ensure compliance with those requirements. Initial brief from KDC, at 39-41. While not agreeing with the reasoning for KDC's conclusion, because of the supplemental language KDC included in its consistency submission to the Commission (see pp. 1-2 of this decision), the Commission agrees that no issue under Element III

is raised in this appeal. Initial brief from the Commission, at 34.

A. CAA

Section 109 of the CAA, 42 U.S.C. §§ 7401 et seq., directs the Administrator of EPA to prescribe National Ambient Air Quality Standards (NAAQSs) for air pollutants to protect the public health and safety. Section 110 requires each State to prepare and enforce an implementation and enforcement plan for attaining and maintaining the NAAQSs for the air mass located over the State.

The Secretary, in previous consistency appeal decisions, has recognized the exclusive authority of the Secretary of the Interior under the Outer Continental Shelf Lands Act, as held in California v. Kleppe, 604 F.2d 1187 (9th Cir. 1979), to set standards for air emissions from oil and gas activities on the OCS. Exxon Santa Ynez Decision, at 13; Gulf Decision, at 20. DOI must set these standards at levels that will allow State and local governments to attain the NAAQSs established under the CAA. 604 F.2d 1187, 1196. DOI has promulgated regulations to ensure compliance with the NAAQSs of OCS oil and gas activities that affect the air quality of a State. 30 C.F.R. Part 250. Discharges under KDC's proposed NPDES permit will take place in connection with exploratory drilling. Exploratory drilling and the air emissions associated with such drilling may only take place if MMS of DOI approves a POE covering the drilling site. In order to obtain such approval, the oil company(ies) possessing the lease(s) to the site must demonstrate to MMS that the drilling operations will meet the DOI requirements for air emissions from OCS oil and gas point sources. The operations must be conducted in accordance with those regulatory requirements. Thus, there is no reason to believe that KDC's activity will violate any CAA requirements, and I so find that it will not.

B. FWPCA

Under sections 301(a) and 402 of the FWPCA, the discharge of pollutants into OCS waters is unlawful except in accordance with the terms of an NPDES permit issued by EPA.

The Secretary, in previous consistency appeal decisions, has determined that the requirements established by or pursuant to the FWPCA are those contained in the NPDES permit covering the activity. In this case, KDC previously applied for and received a final NPDES permit from EPA. The effectiveness of this permit was conditioned only on obtaining the Commission's concurrence with KDC's consistency certification. Because KDC may not conduct its proposed activity without adhering to the terms of its NPDES permit, and thus meeting the standards of the FWPCA, I find that the proposed activity will not violate any requirements of the FWPCA.

Element Four: There is No Reasonable Alternative Available (e.g., Location, Design, etc.) That Would Permit the Activity to Be Conducted in a Manner Consistent with the State Coastal Management Program

The Commission in its consistency objection did not describe, as required by 15 C.F.R. § 930.64(b)(2), any "alternative measures (if they exist) which, if adopted by the applicant, would permit the activity to be conducted in a manner consistent with the [California] management program." KDC argues that the Commission's failure to describe any alternatives in its objection creates a conclusive presumption in this appeal proceeding that there are no such alternatives. It asserts that to hold otherwise would defeat the intent of 15 C.F.R. § 930.64(b)(2), which, it argues, is to guarantee that an applicant is provided due process and to ensure efficiency and fairness in the consistency review process. Initial brief from KDC, at 43.

The Commission disagrees. Because Element Four of Ground I requires a determination of whether a reasonable alternative is available, the Commission argues that it automatically has a second opportunity to describe such alternatives in its submissions in the appeal. The Commission then argues that if such an alternative(s) is described, either in the consistency objection or during the appeal, the burden is on KDC to demonstrate that the alternative is unreasonable or unavailable. Initial brief from the Commission, at 35-36.

The regulations governing consistency appeals do not discuss "burden of proof." They merely state that the Secretary shall find that a proposed activity satisfies either of the two statutory grounds "when the information submitted supports this conclusion." 15 C.F.R. § 930.130(a).

The term "burden of proof" encompasses the burden of producing evidence and the burden of persuasion. Except as otherwise provided by statute, the moving party before an administrative tribunal generally bears both burdens.

Here, section 307(c)(3)(A) of the Act and its implementing regulations, especially 15 C.F.R. § 930.64(b)(2), read together with Element Four, 15 C.F.R. § 930.121(d), place the burden of describing any alternatives that exist that would permit the proposed activity to be conducted in a manner consistent with the State coastal management program on the objecting coastal management agency.

commencing review, rather than authorizing the Secretary to make the determination for the State, under section 307(c)(3)(A) of the Act and 15 C.F.R. § 930.63(a) of the implementing regulations, the State's concurrence with the applicant's consistency certification is conclusively presumed. If a State properly lodges an objection, the Act allows the Secretary to override the objection if the proposed activity satisfies either of the two statutory grounds. It would be incongruous with this structure for the Secretary to determine the consistency of an alternative merely because an appeal was filed.

15 C.F.R. § 930.64(b)(2) requires a State, at the time it objects to the consistency certification for a proposed activity, to describe any alternatives that would be consistent with its management program. The regulation serves two purposes. First, it gives the applicant a choice: adopt the alternative (or, if more than one is identified, adopt one of the alternatives) or, if the applicant believes all alternatives not to be reasonable or available, either abandon the proposed activity or appeal to the Secretary and demonstrate the unreasonableness or unavailability of the alternatives. Second, it establishes that an alternative is consistent with a State's program because the State body charged by the Act with determining consistency makes the identification of the alternative.

Thus, the Act and its implementing regulations charge the State with interpreting its own management program and applying it to a proposed activity to determine its consistency. Since determining consistency is the State's responsibility, and since that determination is within the State's control, the State should be and is allocated the burden of describing consistent alternatives. If the State describes one or more consistent alternatives in its objection, the burden shifts to the appellant. In order to prevail on Element Four, the appellant must then demonstrate that the alternatives(s) is unreasonable or unavailable.

The next issue that must be addressed is whether on appeal the State has the right to fulfill its burden by describing consistent alternatives that it did not describe in its objection. The Commission did not describe any alternatives in its objection to KDC's consistency certification. Instead, it purports to raise an alternative in its briefs in the appeal. KDC questions whether the Commission has a right to describe alternatives at this late stage.

Considering the purposes of 15 C.F.R. § 930.64(b)(2), discussed above, I conclude that the State has no such right. To hold otherwise would make compliance by the State with the requirement of description of existing consistent alternatives voluntary rather than mandatory, thus frustrating the purposes of that section. If the State does not describe alternatives in its objection, an applicant will be forced to undertake the costs of preparing and filing an appeal and suffer the delay in its

activity associated with that process in order to compel the State to describe alternatives.

There may, however, be instances where good cause exists as to why a State could not have described a consistent alternative at the time it objected. For example, changes in technology may offer a reasonable alternative previously unavailable. Providing that a State demonstrates good cause for not describing an alternative at the time of its objection, I will exercise my discretion and allow the State to describe it. The appellant then, in order to prevail on Element Four, will have the burden of demonstrating that the alternative is unreasonable or unavailable.

There may also be instances where the record discloses an alternative that might be consistent with the State's management program and that appears reasonable and available. In such an instance, in the exercise of Secretarial discretion, I may choose to identify such alternative to the parties. If the State then indicates that such alternative is consistent,[12] the appellant will have the burden of showing that the alternative is unreasonable or unavailable. If the State chooses not to so indicate, I will not find the alternative to be consistent.

Because the Commission may not have been fully apprised of its responsibility with respect to describing consistent alternatives in its objection or the necessity of showing good cause for a later description upon appeal, in order not to prejudice the interests of the Commission, I have examined its briefs to determine whether it has described any reasonable and available alternatives.

The Commission states that "[i]t is conceivable that appropriate commitments to the use of domestic employees and services would enable KDC to operate successfully and [conduct its activities in a manner consistent with the CCMP]." Id. at 36. I find that this statement is not specific enough to describe an alternative that would permit the proposed activity to be conducted in a manner consistent with the CCMP.

Accordingly, I find that there is no reasonable alternative available that would permit the proposed activity to be conducted in a manner consistent with the CCMP.

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12 I recognize that in some instances a State will only be able to indicate the probable consistency or lack thereof, pending a final determination when the appellant formally submits the alternative to it.

Conclusion

Having found all elements of 15 C.F.R. § 930.121 satisfied, I conclude that the proposed activity may be Federally permitted because it is consistent with the objectives or purposes of the Act. EPA may now make its NPDES permit for KDC effective.

C. William Verity

Secretary of Commerce

Authorized OCS Lease Parcel Numbers

The discharge sites to be authorized under this permit are those of the following tracts (by OCS lease parcel number) which are active, and/or shall become active during the term of this permit:

In waters west and northwest of Point Arguello:

P-0393	P-0394	P-0395	P-0396	P-0397	P-0400
P-0401	P-0402	P-0403	P-0404	P-0405	P-0406
P-0407	P-0408	P-0409	P-0410	P-0411	P-0412
P-0413	P-0414	P-0415		P-0418	P-0419
P-0420	P-0421	P-0422	P-0424	P-0425	P-0426
	P-0429	P-0430	P-0431		P-0433
P-0434			P-0437	P-0438	P-0439
P-0440	P-0441	P-0443	P-0444	P-0445	P-0446
P-0447	P-0448	P-0449	P-0450	P-0451	P-0452
P-0453	P-0491	P-0492	P-0493	P-0494	P-0495
P-0496	P-0497	P-0498	P-0499	P-0500	

B In waters south and west of Pt. Conception:

P-0315	P-0316	P-0317	P-0318	P-0319	P-0320
P-0321	P-0322	P-0323	P-0324	P-0325	P-0327
P-0328	P-0330	P-0331	P-0332	P-0333	P-0338
P-0456	P-0457				

In the Santa Barbara Channel from Pt. Conception to Goleta Point:

P-0180	P-0181	P-0182	P-0183	P-0184	P-0185
P-0186	P-0187	P-0188	P-0189	P-0190	P-0191
P-0192	P-0193	P-0194	P-0195	P-0196	P-0197
P-0326	P-0329	P-0334	P-0335	P-0336	P-0339
P-0340	P-0341	P-0342	P-0343	P-0344	P-0345
P-0348	P-0349	P-0350	P-0351	P-0352	P-0353
P-0354	P-0355	P-0356	P-0357	P-0358	P-0359
P-0360	P-0459	P-0460	P-0461	P-0462	P-0463
P-0464	P-0465	P-0467	P-0469	P-0475	

In the Santa Barbara Channel from Santa Barbara to Ventura:

P-0168	P-0202	P-0203	P-0204	P-0205	P-0208
P-0209	P-0210	P-0215	P-0216	P-0217	P-0231
P-0232	P-0233	P-0234	P-0238	P-0240	P-0241
P-0337	P-0346	P-0347	P-0361	P-0468	P-0472
P-0473	P-0474	P-0478	P-0479		

Authorized OCS Lease Parcel Numbers

(E) In waters south of Santa Rosa and Santa Cruz Islands:

P-0362 P-0363 P-0364 P-0480 P-0481 P-0482
P-0483 P-0484 P-0485 P-0486 P-0487

In the San Pedro Channel between San Pedro and Laguna:

P-0295 P-0296 P-0300 P-0301 P-0306 P-0368
P-0488

In waters west of San Clemente Island in the Tanner Bank Area

P-0367 P-0369 P-0489 P-0490

In the areas covered by the following tracts which were leased in MMS Lease Sale No. 68:

P-0456 P-0457 P-0459 P-0460 P-0461 P-0462
P-0463 P-0464 P-0465 P-0467 P-0468 P-0469
P-0472 P-0473 P-0474 P-0475 P-0478 P-0479
P-0480 P-0481 P-0482 P-0483 P-0484 P-0485
P-0486 P-0487 P-0488 P-0489 P-0490

In the areas covered by the following tracts which were leased in MMS Lease Reoffering Site No. 2

P-481 thru P-500

In the areas covered by the following tracts:

P-507 P-508 P-509 P-511 P-512
P-514 P-515 P-516 P-517